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No. 80-2196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Where one objective of a multi-objective federal conspiracy does not state an offense, may the conspiracy conviction stand upon another objective, when the District Court has charged the jury that a conviction could rest of any one objective without violating the Supreme Court's decision in *Stromberg v. State of California*?

II. (a) Did Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be utilized to create the unique criminal offense of *conspiracy to attempt*?

(b) Did the Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be combined with State Department regulation 22 C.F.R. Section 127.01 to create the unique offense of *conspiracy to attempt* to export without a license?

III. May a lawfully registered exporter of firearms with the Department of State be convicted of an attempt to export firearms without an export license where the specific place, time and manner of the alleged illegal exportation is unknown?

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Antoine Mowad respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 17, 1981.

PETITIONER'S REPLY

I

1. THE GOVERNMENT IN THEIR BRIEF IN OPPOSITION HAS IGNORED THE QUESTION PRESENTED RAISED IN PETITIONER'S WRIT OF CERTIORARI.

(a) It is fundamental to our system of justice that before a person may be convicted of an offense, it must 1) be a valid offense and 2) the jury must be clearly charged to consider it.

The Government attempts to bury a wide split among the federal circuits on a recurring federal conspiracy issue, which results in

reversal in one Circuit and affirmance in another. The Government sidesteps the question as to whether a criminal defendant's freedom should be decided only on the quality of the evidence or in addition by the locality of the Court of Appeals. If petitioner's case had arisen in the 3rd, 7th or 9th Circuits, his conspiracy conviction would have been reversed. *United States v. Dansker*, 537 F. 2d 40, 51 (3rd Cir. 1976); *United States v. Tarnopol*, 561 F. 2d 466, 473-474 (3rd Cir. 1977); *United States v. Baranski*, 484 F. 2d 556, 559-561 (7th Cir. 1973) and *United States v. Carman*, 577 F. 2d 556, 566-568 (9th Cir. 1978). In the Second Circuit, it was affirmed. *United States v. Mowad*, 641 F. 2d 1067, 1073-1074 (2d Cir. 1981); *United States v. Dixon*, 536 F. 2d 1388, 1402 (2d Cir. 1976). It is petitioner's position that the varying addresses should not have been the seminal consideration, and that this is a traditional ground for Supreme Court review.

In the 7th and 9th Circuits reversal is *required* by the Supreme Court's decision in *Stromberg v. State of California*, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). The Government argues that the 7th and 9th Circuits are wrong in their position. That is not the issue at this stage. These Circuits believe they are right and that *Stromberg* requires reversal. The fact that the Government does not believe that *Stromberg* requires this result, does not change the position of the 7th or 9th Circuits, nor the discriminatory results form Circuit to Circuit.

Nowhere in the Government's Brief in Opposition do they even recognize the Question Presented: Where one objective of a multi-objective federal conspiracy does not state an offense, may the conspiracy conviction stand upon another objective, *when the District Court has charged the jury that a conviction could rest on any one objective*, without violating the Supreme Court's decision in *Stromberg v. State of California*?

Since the jury in petitioner's case was charged that his conviction could rest upon "some object", how can we know that when petitioner was found guilty upon the first object, which the Court of Appeals subsequently held does not state an offense, the jury *even considered* the second object which was the bizarre and conceptually incomprehensible "conspiracy to attempt" to export? The Government assumes the jury considered the valid objective in the conspiracy charge. How can the Government assume this when the District Court charged the jury that a finding of guilt upon any

object would suffice? To make a man a convicted felon, more than the Government's assurances are required. The Government is willing to gamble and to guess, petitioner is not.

The Court should remember that in the Second Circuit no scienter is required for a conviction under 18 U.S.C. Section 922(a)(1), the invalidated offense under Count I. *United States v. Mowad, supra,* at 1072 n.10. Therefore, the petitioner at trial could not defend his failure to have a dealer's license under Count I on the belief that a lawful exportation as a registered exporter with the State department was sufficient. Further, since the District Court incredibly charged the jury that "dealing" included "exporting" the petitioner's defense that as a registered exporter he intended to lawfully export, was a valid defense under Count II — the charge of attempted exportation — but an admission of guilt under Count I — the dealing charge — since no scienter is required and a good faith belief that one is complying with the exportation laws is not a defense to an unlawful dealing charge. So, by claiming innocence under Count II, petitioner was confessing under Count I. Therefore, when the jury considered Count III, the conspiracy charge, and came upon the first objective, which was the conspiracy to deal, there can be little doubt that the jury under a "some object" charge by the District Court, felt it unnecessary to deal with the conceptually unintelligible "conspiracy to attempt" to export objective.

For the Government to now come before the Supreme Court and claim the jury convicted petitioner on this "conspiracy to attempt" to export objective, is not only incorrect but an unfair argument which could only lead this Court to a complete miscarriage of justice. Petitioner who in this case had to carry the disabling burden of the poor judgment of the Government, Grand Jury and District Court by the bringing and failure to dismiss the dealing charge, which poisoned his trial, should not now be robbed of a hearing before this Court because of a claim that the jury must have found him guilty of a second objective, which the jury not only never considered, but which was never even candidly explained by the District Court for the simple reason that the reported decisions nowhere record even one individual who has ever been convicted of a "conspiracy to attempt" to export, no doubt due to the fact no one has ever considered it an offense.

Petitioner assumes the jury did as the District Court instructed, and therefore the second objective was never considered, and that his conspiracy conviction to this day rests upon the invalid objective.

Further, the Government's statement that a conspiracy to deal automatically infers a "conspiracy to attempt" to export is both factually and legally incorrect. The petitioner was a lawfully registered exporter with the Department of State. If the dealing objective had been excluded, as it should have been, from the jury's consideration, the jury may have well found that petitioner's alleged coconspirators — two of whom were foreign nationals and who undisputedly spoke and understood no English — had relied upon the petitioner's export registration and that he would therefore legally export. Petitioner testified at trial that all concerned were aware of his registration with the Department of State. The petitioner did not secure a dealer's license, because he believed none was required — and he was right! However, the jury knew none of this — his belief no license was required, or that he would be found legally correct in is judgment by the Court of Appeals. To say the jury's finding of guilt on the bogus dealing objective assures they found petitioner guilty of the "conspiracy to attempt" to export charge, is contrary to the facts, law and charge by the District Court, who stated that a conviction on "some object"was sufficient. A dealer's license and an export license are two separate licenses. The Government tries to equate them as one license, one charge. They, of course, are not. The Government argues petitioner's guilt on the second objective by his conviction on the invalid objective. Such an artificial verdict of guilt does little to enhance the public's constitutional protections.

The Government has completely ignored the Question Presented and the charge by the District Court permitting conviction upon one objective of the conspiracy. When the District Court's charge is considered with the fact that the invalid dealing objective was the first listed in the conspiracy count and that the second objective was the "conspiracy to attempt" charge, the recent words of this Court, citing the *Stromberg* decision are dispositive:

> We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been

> punished for noncriminal conduct. *Chiarella v. United States*, 445 U.S. 222,237 n.21,100 S.Ct. 1108, 1119, 63 L.Ed. 2d 348 (1980).

This at a minimum requires the Federal Courts not to permit a conviction upon any one of several objects where one objective is invalid. This was the purpose of the *Stromberg* decision, which is the basis of the split in the Circuits and Question Presented before this Court.

2. THE GOVERNMENT'S CLAIM THAT THERE IS NO IRRECONCILABLE CONFLICT IS A FLAT MISSTATEMENT OF THE LAW.

The Government's effort to claim that there is no "irreconcilable conflict" in the Circuits is patently incorrect. The conflict among the Circuits is clearly established in petitioner's Writ of Certiorari (Petition For Writ of Certiorari, pp. 7-17). In fact, there are conflicting panel decisions within two Circuits, the 5th and 7th Circuits. (Petition For Writ of Certiorari, p. 8). The conflict in the 7th Circuit was even recognized as such in the 9th Circuit's decision in *United States v. Carman, supra* at 566.

Despite the Government's attempt to distort the decisions of the various Court of Appeals, there can be no doubt of their meaning. In *United States v. Baranski, supra* at 560-561, the Court in reversing a multi-objective conspiracy charge, where one object was found to be unconstitutional, rested its decision upon the "analogous situation" in *Stromberg v. State of California,* and left no doubt as to the controlling logic of the Circuit's decision:

> Because the jury returned a general verdict on that count, we cannot know which of the three statutes the violations of which were the 'objects' of the conspiracy the jury relied on in convicting the defendants. The trial court had instructed the jury that actions taken to attain any of the three alleged objects would suffice for conviction. *United States v. Baranski, supra,* at 560.

As to which object the jury based its conviction, the Court stated: "We decline to speculate on such a matter". *Id.*, at 561. The Court further held:

> The controlling matter here in our opinion, is not the proof upon which the jury might have convicted under the conspiracy count but rather the proof upon which the jury did convict. *Ibid.*

In *United States v. Carman, supra,* at 566-569, the Court reversed a conspiracy conviction, where, as here, one object of a multi-objective conspiracy failed to state an offense. The Court not only recognized the split both among and within the Circuits, which the Government disputes, but reviewed an en banc decision within the Circuit, *Samuel v. United States,* 169 F.2d 787, 798 (9th Cir. 1948)(en banc), as well as this Court's decision in *Stromberg v. State of California* and held: "These decisions we believe compel the result we have reached", *United States v. Carman, supra,* at 566, the reversal of the conspiracy count. The Court specifically held that the failure of a substantive charge to state an offense, which was one of several objects of the conspiracy charge, required reversal ("The appellant asserts that this possibility demolished the entire conspiracy conviction. We agree". *Ibid.*).

In *United States v. Dansker, supra,* at 51, the Court, finding the evidence insufficient to establish the substantive offense of bribery of one Serota, reversed the conspiracy conviction which charged two objects — the bribery of Serota and one Ross. The Court held that because the District Court charged that the conspiracy could rest upon either bribe, the conviction had to be reversed, even though the Court found it unlikely that the jury had found the conspiracy only upon the Serota bribe, the invalid object. The mere possibility that only the invalid objective was considered or found by the jury to support the conviction, was sufficient to mandate reversal. Again, the issue was not the evidence as to the valid objective, but simply whether one objective was invalid and whether the District Court's charge permitted a conviction solely upon the invalid object.

The decision in *United States v. Tarnopol, supra,* at 473-474, is best explained by the following quote:

> The jury rendered a general verdict of guilt on the conspiracy count under instructions by the trial judge that the defendants could be found guilty on

> this count if the jury found that the defendants had engaged in any one or more of the illegal activities alleged in the count as objectives of the conspiracy. Under these circumstances, it is impossible to determine whether or not the jury based its verdict upon less than all three of these activities and, if so, upon which ones the verdict was found. *Ibid.*

Accord: *Van Liew v. United States*, 321 F. 2d 664, 672 (5th Cir. 1963).

Each of these decisions stand unquestionably for the legal proposition that where one "object" of a multi-objective conspiracy fails to state a valid offense, the District Court charge that conviction may rest on any object, requires reversal. Both the 7th and 9th Circuits are of the opinion that the Supreme Court's decision in *Stromberg v. State of California* requires this result. The Government's claim that these decisions stand for the proposition that the Courts will review the evidence to determine whether the jury found guilt upon a valid object, is not the holding of these decisions, but rather is the position taken by the minority Circuits, such as the Second Circuit. *United States v. Dixon, supra* at 1402, which are not cited in the Government's brief. It is precisely this conflict, recognized by the Courts themselves, which we ask the Supreme Court to resolve, particularly inasmuch as two Circuits are of the opinion that reversal in petitioner's case is required by *Stromberg v. State of California.*

II

3. CONGRESS NEVER INTENDED TO CREATE THE OFFENSE OF CONSPIRACY TO ATTEMPT.

It is 2½ years since the original indictment in this case, yet the Government still cannot decide whether the only remaining "valid" objective of the conspiracy count — the "conspiracy to attempt" — is "the only appropriate charge" (A-2006), or "inartful drafting" as now claimed in the Government's Brief in Opposition. (Brief for The U.S. in Opp., p. 9; see also Government's brief before the Court of Appeals, pp. 22-23).

This is only one of the many unanswered questions as to this object. Is "conspiracy to attempt" a separate offense from

"conspiracy to export"? Is it the same offense? If it is, why did the Government claim it as "the only appropriate charge"? Did the Grand Jury feel a "conspiracy to export" could not be brought but only a "conspiracy to attempt"? If so, what is the legal distinction between the offenses? Is a separate jury charge required for a "conspiracy to attempt"? If so, what is it? Does a "conspiracy to attempt" require a finding of an "overt act" toward a "substantial step"?

The District Court admitted that Her Honor did not believe such a charge existed. The Court of Appeals gave no explanation for finding such an offense, nor defining it. There is no way petitioner could defend against a charge when the Government couldn't decide which one was intended, the District Court didn't believe one existed and the Court of Appeals didn't explain it. The charge should not be made to fit the conviction.

How can a federal criminal defendant be convicted of a "conspiracy to attempt" when no federal court has ever explained what it means? If the Goverment, District Court and the Court of Appeals must pause as to its meaning, one may only guess as to the difficulty encountered by the jury. Unless, of course, the jury obeyed the District Court's charge and convicted solely upon the invalid dealing objective.

III

4. A DEFENDANT MAY NOT BE CONVICTED OF A FEDERAL CRIMINAL ATTEMPT IF IT IS UNKNOWN EXACTLY WHEN, WHERE OR HOW THE ALLEGED SUBSTANTIVE OFFENSE WILL OCCUR.

The Government fails to come to grips with the reality of the conduct which underlies the alleged offense. There is no reported federal attempt case where the place, time and manner of the alleged substantive offense was unknown. The Government states that we offer no case for this proposition. Never before has a federal criminal defendant been convicted for an attempt under such extraordinary circumstances. The decision in this case is so perverse, such a departure from the general attempt cases, that the only precedent available is all the federal precedent on the doctrine of attempt — where the place, time and manner of the alleged attempt is apparent in every case. The attempt is uniformly at the

scene of the substantive offense, or so near the scene as to be unquestionably identifiable. The time of commission is imminent and the manner is apparent by the very attempt to complete the substantive conduct.

Bearing in mind that the attempt here is the "severance of goods" from a port of exit of the United States without an export license, *Swan and Finch Company v. United States,* 190 U.S. 143, 145,23 S.Ct. 702, 703,47 L.Ed. 984 (1902), the petitioner, who was lawfully registered with the Department of State to export these very firearms in question, was arrested after making a lawful purchase from federally licensed firearms dealers during regular business hours. The petitioner arrived at the gun shop to purchase his firearms, then was taken by the Government informants to a warehouse in an informant's car, leaving one of petitioner's cars back at the gunshop, and was then arrested at the warehouse for an attempt to export firearms without an export license. The Government's claim is that four adult men, with two mammoth packing crates, unmarked, and with no marking materials on any person arrested, were to pile into one car, leaving their other car at the gunshop, and drive to some unidentifiable port of export to immediately and illegally export these firearms to Lebanon. But, incredibly, it does not stop here.

Further, the Government claims that petitioner asked an ATF agent at the warehouse the best route to New York City. The Government contends this establishes that the firearms were to flown out of one of the New York airports that day. Even if we assume that a smuggler would attempt to illegally export without knowing where the port of export was, and would rely upon the chance he would meet someone along the way who would know the route — this while carrying the alleged contraband goods in two huge crates, in which are 110 handguns all in boxes marked "Colt" — no one would ask how to go to "New York City" if he wanted to know how to arrive at either J.F.K. or LaGuardia, unless the Government's claim is that the port of exit to Lebanon was the Manhattan heliport. This is not to mention that petitioner's passport, offered in evidence by the Government, showed several entry stampings into the United States in New York. (Government Exhibit 31, A-2762-2765).

The Government's own evidence established that petitioner was a registered exporter of those category of firearms, and that all registered exporters automatically receive the export applications to secure individual export licenses. As such, his conduct was as completely consistent with applying for an export license as with anything else. The Government claims petitioner is a smuggler who registered with the Department of State as one "engaging in the business of exporting firearms", 22 U.S.C. Section 2778(b)(1), 22 C.F.R. Section 122.01, paying a fee of $500, and who on the alleged day of the alleged illegal act didn't know how to get to the place of export. On this logic, petitioner is in prison.

Even assuming the peitioner wanted to export illegally, there is no way of knowing if the substantive offense — the actual export — would have occurred in a week, a month or a year.

In this case the elements of time and distance have been eliminated by the Second Circuit, a dramatic change in the law. This issue the Government fails to recognize in their Brief in Opposition. It is this revolution in the character of the federal attempt doctrine, which petitioner asks this Court to review.

CONCLUSION

The petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit and that the Court summarily reverse the judgment of the court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Respectfully submitted,

Dated: September 15, 1981

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